Oral Argument Not Yet Scheduled

Nos. 16-70699 and 16-71001

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAPAY, INC. d/b/a FARM FRESH TO YOU

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

BAKERY, CONFECTIONERY, TOBACCO WORKERS & GRAIN MILLERS UNION LOCAL 85

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Capay, Inc. d/b/a/ Farm Fresh to You ("Capay") to review, and the cross-application of the National Labor

Relations Board ("the Board") to enforce, the Board's Order in *Capay, Inc. d/b/a/ Farm Fresh to You*, 363 NLRB No. 142 (Mar. 4, 2016). (CER 9-11.)[1]

The Board had jurisdiction over this matter under Section 10(a) (29 U.S.C. § 160(a)) of the National Labor Relations Act, as amended ("the Act"). The Board's Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

Capay filed its petition on March 14, 2016, and the Board filed its cross-application on April 8. The filings were timely because the Act imposes no time limit on the initiation of review or enforcement proceedings. Bakery, Confectionery, Tobacco Workers & Grain Millers Union Local 85 ("the Union") has intervened on behalf of the Board. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act because the unfair labor practices were committed in California.

Because the Board's Order is based in part on findings made in the underlying representation (election) proceeding, the record in that proceeding (Case No. 20-RC-153475) is also before the Court under Section 9(d) of the Act (29 U.S.C. § 159(d)). *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964).

[1] Citations are to the Excerpts of Record (CER) filed with Capay's brief. References preceding a semicolon are to the Board's findings; references following it are to the supporting evidence. "Br." cites are to Capay's opening brief to the Court. "A-" cites are to the Statutory and Regulatory Addendum.

Section 9(d) does not give the Court general authority over the representation proceeding. Rather, it authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair-labor-practice order in whole or in part. The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the Court's ruling. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT OF THE ISSUE

The ultimate issue in this case is whether substantial evidence supports the Board's finding that Capay violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, the certified collective-bargaining representative of the unit employees. The contested issue before the Court is whether the Board acted within its broad discretion in overruling Capay's election objections without a hearing.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the National Labor Relations Act, the Board's Rules and Regulations, and the Board's Representation Casehandling Manual are reproduced in the Addendum to this brief, except for those already included in the addendum to Capay's opening brief.

STATEMENT OF THE CASE

After the Union prevailed by a vote of 23 to 15 in a Board-conducted representation election, the Board certified it to represent Capay's warehouse employees. (CER 30, 35-36.) Capay refused to bargain with the Union, and the Board found that its refusal violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (CER 9-11.) Capay does not dispute that it refused to bargain; rather, it contends that it had no duty to do so because the Board improperly certified the Union. In support of that claim, Capay argues that the Board abused its discretion in the underlying representation case by overruling Capay's election objections without conducting an evidentiary hearing. Under settled law, Capay was not entitled to a hearing unless it presented specific evidence that would, if credited, warrant setting aside the election. The Board found that it failed to meet that burden. (*See* CER 29-36.)

I. THE REPRESENTATION PROCEEDING

Capay is engaged in the growing, packaging, shipping, and retail sale of produce and has a facility in West Sacramento, California. (CER 9.) The Union filed a petition with the Board seeking certification as the bargaining representative of Capay's warehouse employees at the West Sacramento facility on June 3, 2015 (amended June 9). (CER 29; CER 23.) On June 11, Capay voluntarily entered into a Stipulated Election Agreement with the Union, which was approved by the

Board's Regional Director for Region 20. (CER 29; CER 24-26.) Under the Agreement, Capay and the Union waived their respective rights to a pre-election hearing, otherwise mandatory under Section 9(c)(1) of the Act (29 U.S.C. § 159(c)(1)). (CER 24 ¶ 1.) Instead, Capay agreed with the Union as to the appropriate bargaining unit, which was to include:

> All full time and regular part time warehouse employees employed by the Employer at its [West Sacramento] facility . . . , including packers, lead packers, prepping, and lead prepping.

(CER 29; CER 24.)

The parties also agreed that sanitation employees could vote in the election, but "their ballots will be challenged since their eligibility has not been resolved." (CER 30; CER 24.) The eligibility or inclusion of the sanitation employees was to "be resolved, if necessary, following the election." (CER 30; CER 24.)

Following the July 1 secret-ballot election, the tally of ballots showed 23 votes for the Union and 15 votes against it. (CER 9, 29-30; CER 28.) There were four non-determinative, challenged ballots, all of which were cast by sanitation employees. (CER 30; CER 28.)

Capay filed five objections to the election. (CER 12-13.) In Objection 1, Capay "object[ed] to the inclusion of the Sanitation employees" in the unit because they "have no community of interest with the prepping and packing employees." (CER 12.) As support for its Objection, Capay submitted an offer of proof and

supplied job descriptions for its packing, prepping, and sanitation employees. (CER 53, 57-67.)

In Objections 2-4, Capay objected to the Union's purported pre-election conduct towards voting-eligible employees, claiming that its conduct violated the Board's "captive audience rule." (CER 12-13.) Capay submitted an offer of proof and provided employee affidavits to support its allegations that during the 24-hour period before the election, the Union solicited employees' votes by visiting employees' homes; by telephoning employees at home; and by congregating outside the facility's entrance on the morning of the election, stopping employees as they entered work. (CER 12-13; CER 53-55, 71-87.)

In Objection 5, Capay objected to the Union's purportedly threatening and harassing voting-eligible employees. (CER 13.) As support for its allegations, Capay submitted an offer of proof and provided affidavits from two employees. (CER 53-54, 71, 75-77.) In addition to that evidence, Capay submitted evidence alleging that the Union promised benefits to a non-voting-eligible employee. (CER 34-35 & n.6; CER 53, 69.)

On July 30, the Regional Director issued a Decision overruling Capay's objections and certifying the Union as the employees' bargaining representative. (CER 29-37.) Specifically, he found that Capay "failed to raise any material and substantial issue of fact that would warrant a hearing, much less necessitate setting

aside the election results." (CER 35.) Capay requested review of the Regional Director's Decision (CER 38-51), which the Board (Members Miscimarra, Hirozawa, and McFerran) denied because Capay raised no substantial issues warranting review (CER 89). The Board also found that Capay raised issues of improper electioneering and surveillance in its Request for Review that were not properly before the Board because Capay did not first present those issues to the Regional Director. (CER 89 n.1.) Even if those issues were properly raised, however, the Board found that they too lacked merit.[2] (CER 89 n.1.)

II. THE UNFAIR LABOR PRACTICE PROCEEDING

In or about September 2015, the Union requested that Capay recognize and bargain with it as the unit employees' exclusive collective-bargaining representative. (CER 10 & n.2; CER 100 ¶ 10.) Capay has admittedly refused to do so. (CER 10; CER 100 ¶¶ 11-12.) Based on unfair-labor-practice charges filed by the Union, the Board's General Counsel issued a complaint alleging that Capay's refusal violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (CER 9-10; CER 90, 93-96.) In its answer, Capay admitted its refusal, but claimed it had no duty to bargain because the Board should not have overruled

[2] Member Miscimarra would have found that Capay "sufficiently raised its electioneering and surveillance arguments," but agreed with his colleagues that Capay nevertheless "failed to present evidence raising substantial and material issues regarding either argument." (CER 89 n.1.)

its objections and certified the Union without first granting a hearing on its objections. (CER 9; CER 100 ¶¶ 11-12, *see also* CER 101-02 ¶¶ 15-19.)

The General Counsel subsequently filed a motion for summary judgment, and the Board issued a notice to show cause. (CER 9; CER 17-21, 105.) In its opposition, Capay reasserted its position that the sanitation employees do not share a community of interest with the existing unit; that the underlying representation election was tainted by the Union's violation of the captive audience rule, electioneering, and threats; and that the Regional Director erred in failing to conduct a hearing on Capay's objections. (CER 106-08.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On March 4, 2016, the Board (Members Miscimarra, Hirozawa, and McFerran) issued its Decision and Order, granting the General Counsel's motion for summary judgment and finding that Capay's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (CER 9-11.) The Board concluded that all representation issues raised by Capay in the unfair-labor-practice proceeding were or could have been litigated in the underlying representation proceeding, and that Capay did not proffer any newly discovered or previously unavailable evidence or allege any special circumstances that would require the Board to reexamine its decision to certify the Union. (CER 9.)

The Board's Order requires Capay to cease and desist from refusing to bargain with the Union, and in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (CER 10.) Affirmatively, the Board's Order directs Capay, on request, to bargain with the Union, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (CER 10-11.)

SUMMARY OF ARGUMENT

The Board acted well within its broad discretion in overruling Capay's objections to a secret-ballot election in which employees selected the Union as their bargaining representative. Capay does not ask the Court to overturn the election results; it seeks a remand for the Board to conduct a hearing on its objections. (Br. 9.) Because Capay did not meet its burden of producing specific evidence which, if true, would warrant setting aside the election, it was not entitled to such an evidentiary hearing. Contrary to Capay's assertion, the cumulative effect of its insubstantial objections does not change the result. Thus, the Board properly certified the Union as the employees' collective-bargaining representative, and Capay violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

1. The Court lacks jurisdiction to consider Capay's Objection 1, alleging that the sanitation employees should not be included in the unit because they lack a

community of interest with unit packing and prepping employees. Capay has failed to show that it is aggrieved by this portion of the Board's Order. In accordance with the parties' Stipulated Election Agreement, the sanitation employees voted subject to challenge, but their votes ultimately were not determinative in the election. Consistent with Board practice, the Regional Director, in certifying the Union, made clear that the sanitation classification is neither included in, nor excluded from, the unit. Accordingly, in the subsequent unfair-labor-practice proceeding, the Board did not order Capay to bargain with the Union as the collective-bargaining representative of those employees, and Capay is not aggrieved by the Board's decision not to hold a hearing on whether the sanitation employees should be part of the unit.

Even if Capay were aggrieved by that portion of the Board's Order, the Board acted in accordance with the Stipulated Election Agreement in not definitively resolving the sanitation employees' unit status, and with Board practice, in finding that the parties could resolve their status through a unit-clarification proceeding. The clear text of the Agreement states that the employees' status would be resolved "if necessary, following the election." Here, it was not necessary. It is well-settled that a unit-clarification proceeding is the appropriate way to determine the placement of employees, like the sanitation

employees, who voted subject to challenge, but whose votes were not necessary to reach a majority.

2. Regarding Objections 2-4, Capay claimed that the Union's conduct – telephoning employees, visiting employees' homes, and campaigning outside Capay's facility – in the 24-hour period preceding the election violated the Board's "captive audience rule" set forth in *Peerless Plywood*, 107 NLRB 427 (1953). *Peerless Plywood* prohibits unions and employers from making election speeches on company time to massed assemblies of employees within 24 hours of an election. The Board reasonably found that the Union's alleged conduct, assumed to be true, did not violate the rule because Capay presented no evidence that the employees were on the clock during the purported conversations with the Union, or that the Union compelled employees to attend any meetings en masse.

The Board also acted within its broad discretion in finding that Capay did not properly raise its additional electioneering and surveillance issues, which allege that the Union's mere presence outside the facility on the morning of the election was objectionable. In contravention of the Board's regulations, Capay failed to raise those issues with the Regional Director first, instead raising them for the first time in its Request for Review of the Regional Director's Decision. Consequently, under Section 10(e) of the Act, the Court lacks jurisdiction to consider those issues on review. In any event, as the Board reasonably found, Capay's additional

electioneering and surveillance allegations fail to show objectionable conduct under settled Board precedent. The Union did not engage in prolonged conversations with voters, the alleged conversations took place far from the polling area, and the polls were not yet open at the time of the Union's purported presence outside the facility.

3. Finally, the Board reasonably overruled Objection 5 without a hearing. In Objection 5, Capay alleged that the Union threatened employees that Capay would fire them and check their immigration status if they voted "no" in the election. Capay also proffered evidence that the Union promised benefits to a non-voting-eligible employee if he voted "yes." The Board reasonably found that the Union's alleged statements were permissible under *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 133 (1982), because the statements were clearly recognizable campaign propaganda. Alternatively, the Board found that, even if the alleged statements were considered "threats," Capay failed to allege objectionable conduct because Capay presented no evidence that the Union had the ability to carry out the threats. The Board also found it significant that the recipient of the Union's alleged promise was ineligible to vote in the election.

ARGUMENT

THE BOARD ACTED WELL WITHIN ITS BROAD DISCRETION IN OVERRULING CAPAY'S ELECTION OBJECTIONS WITHOUT A HEARING AND THEREFORE PROPERLY FOUND THAT CAPAY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

An employer violates Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the representative of its employees.[3] Capay admits (Br. 2) that it has refused to bargain with the Union. It asserts, however, that its refusal did not violate Section 8(a)(5) and (1) because the Board improperly certified the Union without conducting a full evidentiary hearing on Capay's objections. On review, Capay petitions the Court to remand the case to the Board to conduct an evidentiary hearing, not to overturn the election. (Br. 9.) As shown below, Capay's arguments that it is entitled to a hearing on each of its objections are without merit.

A. The Objecting Party Bears the Heavy Burden of Proving that the Board Should Hold an Evidentiary Hearing

"Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A. J. Tower Co.*, 329

[3] A violation of Section 8(a)(5) produces a "derivative" violation of Section 8(a)(1), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir] statutory rights." *See NLRB v. Swedish Hosp. Med. Ctr.*, 619 F.2d 33, 35 (9th Cir. 1980).

U.S. 324, 330 (1946); *see NLRB v. Sonoma Vineyards, Inc.*, 727 F.2d 860, 863 (9th Cir. 1984). In keeping with that broad discretion, the Board's denial of an evidentiary hearing over a party's election objections may be disturbed only for an abuse of discretion. *Bell Foundry Co. v. NLRB*, 827 F.2d 1340, 1344 (9th Cir. 1987) (citation omitted); *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1017 (9th Cir. 1981).

It is settled that a party objecting to an election is not automatically entitled to an evidentiary hearing. *St. Elizabeth Cmty. Hosp. v. NLRB*, 708 F.2d 1436, 1444 (9th Cir. 1983); *Durham Sch. Servs., LP v. NLRB*, 821 F.3d 52, 58 (D.C. Cir. 2016). Rather, the objecting party bears a heavy burden to supply "prima facie evidence, presenting 'substantial and material factual issues' which would warrant setting aside the election." *Vari-Tronics Co. v. NLRB*, 589 F.2d 991, 993 (9th Cir. 1979) (citation omitted); *NLRB v. Metro-Truck Body, Inc.*, 613 F.2d 746, 748 (9th Cir. 1979) ("heavy burden" to overcome "presumption that ballots cast under the safeguards provided by Board procedure reflect the true desires of the participating employees" (citation omitted)). A party is not entitled to an evidentiary hearing merely because it "disagree[s] with the Regional Director's findings," *NLRB v. L.D. McFarland Co.*, 572 F.2d 256, 261 (9th Cir. 1978), or wants to "inquire further" into possible election improprieties, *Vari-Tronics Co.*, 589 F.2d at 993.

When the objecting party's evidence, even if credited, would not justify setting aside the election under the Board's substantive criteria as a matter of law, there is simply nothing "to be heard," and the Regional Director may resolve the objections following an administrative investigation. *NLRB v. Carl Weissman & Sons, Inc.*, 849 F.2d 449, 452 (9th Cir. 1988) (citation omitted); *Durham Sch. Servs.*, 821 F.3d at 58; *see* 29 C.F.R. § 102.69(c)(1)(i) (2015) (hearing not required where "evidence described in the accompanying offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, and the regional director determines that any determinative challenges do not raise substantial and material factual issues"). The Board's practice in this regard "is designed to resolve expeditiously questions preliminary to the establishment of the bargaining relationship and to preclude the opportunity for protracted delay of certification of the results of representation elections." *Amalgamated Clothing Workers of Am. v. NLRB*, 424 F.2d 818, 828 (D.C. Cir. 1970) (quoting *Golden Age Beverage Co.*, 415 F.2d 26, 32 (5th Cir. 1969)).

B. Capay Is Not Aggrieved by the Board's Decision Not to Hold a Hearing on Objection 1, and the Board Did Not Err by Leaving the Sanitation Employees' Unit Status Unresolved Because Their Votes Were Non-Determinative

Capay was not ordered to bargain with the Union as the sanitation employees' representative. (CER 10.) To the contrary, the Regional Director made clear that the sanitation employees are "neither included in nor excluded

from the bargaining unit." (CER 36.) As shown below, Capay has not demonstrated that it is "aggrieved" by the Board's decision not to hold a hearing on the inclusion or exclusion of the sanitation workers in the unit because Capay has not been ordered to bargain with the Union as their representative. (CER 10.) Accordingly, the Court lacks jurisdiction to consider Capay's argument (Br. 13-14) regarding the sanitation employees' unit status.

Section 10(f) of the Act provides that "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . ." 29 U.S.C. § 160(f). A person "aggrieved" under Section 10(f) must suffer a loss or an "adverse effect in fact." *Harrison Steel Castings Co. v. NLRB*, 923 F.2d 542, 545 (7th Cir. 1991) (citing *Oil, Chem. & Atomic Workers v. NLRB*, 694 F.2d 1289, 1294 (D.C.Cir.1982)). A party can be aggrieved by only a "portion of a Board decision." *See Harrison Steel Castings Co.*, 923 F.2d at 545 (alterations and quotation marks omitted) (citing *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 210 (1965)). But dissatisfaction with certain Board "findings" or "actions" is not enough to demonstrate aggrievement under the statute. *Harrison Steel Castings*, 923 F.2d at 545 (finding that employer lacked jurisdiction to challenge Board's supplemental decision because it "did not result in coercive action" against the employer); *see Pirlott v. NLRB*, 522 F.3d 423, 433

(D.C. Cir. 2008) (finding that prevailing party was not aggrieved under Section 10(f) even though "Board's written rationale was not as far-reaching as" party would have liked).

Although in its Objection 1, and again here, Capay argues that the sanitation employees share no community of interest with unit packing and prepping employees and that their inclusion in the unit is inappropriate (CER. 12, Br. 7, 13-14), Capay has not established that it is a "person aggrieved" under Section 10(f) of the Act by the Board's decision not to conduct an evidentiary hearing on the issue. Capay has not been ordered to bargain with the Union as the collective-bargaining representative of the sanitation employees. (CER 9-11.) To the contrary, the Regional Director made clear that "the sanitation classification is neither included in nor excluded from the bargaining unit covered by this Certification" (CER 36), and the Board's Order in the subsequent unfair-labor-practice proceeding directs Capay to bargain with the Union as the representative of the employees in the agreed-upon unit (*i.e.*, "[a]ll full-time and regular part-time warehouse employees . . . including packers, lead packers, prepping, and lead prepping") (CER 9-11). Because Capay has failed to show how the Board's denial of a hearing regarding the sanitation workers has "aggrieved" it, the Court lacks jurisdiction to consider this claim.

In any event, even if the Court has jurisdiction to consider Objection 1, the Board acted well within its broad discretion in observing that the sanitation employees' status could be resolved in a unit-clarification proceeding and that their unresolved status provided no basis to overturn the election.[4] (CER 31.) The Board did not "breach[]" the Stipulated Election Agreement, as Capay alleges. (Br. 8.) Rather, it acted in accordance with that agreement and with well-settled Board practice. The parties agreed in the Stipulated Election Agreement that "[t]he eligibility *or inclusion* of [the sanitation employees] will be resolved, *if necessary*, following the election." (CER 24 (emphasis added).) That phrasing indicates that the sanitation employees' eligibility for inclusion in the unit would be analyzed before certification only if their votes were necessary to resolve majority status. *See* 29 U.S.C. § 159(a) (requiring a majority of employees in an appropriate unit to designate or select the union as their bargaining representative). Because the ballots of the sanitation employees were not necessary to resolve the Union's majority status, the Board was able to certify the Union as the unit's collective bargaining representative without resolving their placement in the unit. (CER 31, 36.) *See* NLRB Casehandling Manual, Part 2, Representation Proceedings, Section

[4] A unit clarification petition is "filed by an employer or a labor organization to clarify whether particular employees should be included in or excluded from an existing unit." NLRB Casehandling Manual, Part 2, Representation Proceedings, Section 11490.1 (2014). Relevant provisions of the Board's Casehandling Manual are reproduced in the Statutory and Regulatory Addendum at A-3-A-4.

11474 (2014) (directing regional director to include appropriate language in certification indicating that classifications that voted subject to challenge but were non-determinative "are neither included in nor excluded from the bargaining unit").

The Board's interpretation also aligns with its well-established practice of using a unit-clarification proceeding to ultimately "decide the status of individuals . . . who voted subject to challenge in an election but whose ballots were not determinative," should the parties fail to reach agreement on the issue during bargaining. *See* NLRB Casehandling Manual, Part 2, Representation Proceedings, Section 11490.1 (2014); *see also NLRB v. Dickerson-Chapman, Inc.*, 964 F.2d 493, 500 n.7 (5th Cir. 1992) (stating that usually "question of whether [employees who cast non-determinative ballots subject to challenge] are eligible for the bargaining unit should be resolved by the Board through the Board's unit clarification procedure") (citation omitted); *VWR Int'l, LLC*, 32-RC-095934, 2015 WL 1940836, at *1 n.1 (Apr. 29, 2015) (stating that because ballots voted subject to challenge were non-determinative, parties "may resolve the inclusion or exclusion of [classification] by mutual agreement in bargaining or through a unit clarification proceeding before the Board"). The Board, following this precedent, acted well within its broad discretion (CER 31) in overruling Objection 1 without a hearing.

C. The Board Did Not Abuse Its Discretion in Overruling Objections 2-4 Without a Hearing

The Board acted well within its broad discretion in overruling Objections 2-4 without a hearing. Assuming Capay's evidence to be true, the Board properly found (CER 32-34) the Union's conduct unobjectionable under settled precedent.

1. Capay's evidence in support of Objections 2-4

In Objections 2-4, Capay alleged that the Union engaged in unlawful pre-election conduct, including visiting the homes of voting-eligible employees, telephoning them, and stopping them as they arrived at work on election day. (CER 30-32; CER 12-13.) According to Capay's objections, because the Union engaged in this conduct within 24 hours of the scheduled election, and did so to solicit votes for the Union, it violated the Board's "captive audience rule." (CER 30-32; CER 12-13, *see* Br. 16-17.)

In support of its allegations, Capay submitted an offer of proof, summarizing proposed witness testimony and including employee affidavits regarding this conduct. (CER 32; CER 53-55, 69-87.) The Board found that Capay's evidence showed that union representatives "did, indeed, solicit employees' support for the [Union] during house visits, over the telephone, and on the morning of the election." (CER 32; *see* CER 53-55, 69-87.) Further, employees asserted that a union representative said that if the Union "didn't win the election, [Capay] would fire employees little by little." (CER 32.) Capay's evidence further showed that

union representatives "congregated outside the entrance to [Capay's] facility on election day and campaigned among employees as they approached individually and in groups;" union representatives "engaged some employees to solicit their vote and distributed campaign literature;" and a union agent "stopped one employee at the gate and, in front of other employees, identified him as being in favor of" the Union. (CER 32; *see* CER 53-55, 69-87.)

2. The Union's alleged conduct did not violate the Board's *Peerless Plywood* rule

The Board acted well within its broad discretion in finding (CER 30-34) that, assuming the allegations to be true, Capay failed to make a prima facie showing that the Union violated the Board's *Peerless Plywood*, or "captive audience," rule. In *Peerless Plywood*, the Board established a limited election safeguard concerning pre-election conduct, holding that "employers and unions alike [are] prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." 107 NLRB 427, 429 (1953); *see NLRB v. Hudson Oxygen Therapy Sales Co.*, 764 F.2d 729, 732 (9th Cir. 1985). The Board prohibits such speeches because they "tend[] to create a mass psychology which overrides arguments made through other campaign media." *Peerless Plywood*, 107 NLRB at 429. A violation of the Board's *Peerless Plywood* rule is grounds for setting aside an election, if valid objections are filed. *Id.*

The rule, however, is limited in scope. The proscription does not "interfere with the rights of unions or employers to circulate campaign literature on or off the premises at any time prior to an election." *Id.* at 430. Nor does it "prohibit the use of any other legitimate campaign propaganda or media." *Id.*; *see Virginia Concrete Corp., Inc.*, 338 NLRB 1182, 1187 (2003) (employer's electronic message to employees' trucks within 24 hours of election did not violate *Peerless Plywood* because message was akin to campaign literature and could be ignored).

Likewise, employers or unions may still "mak[e] campaign speeches on or off company premises during the 24-hour period" as long as "employee attendance is voluntary and [the speech is] on the employees' own time." *Peerless Plywood*, 107 NLRB at 430; *NLRB v. Glades Health Care Ctr.*, 257 F.3d 1317, 1320 (11th Cir. 2001) (finding that union's off-premises, voluntary rally, in which union conveyed its message through loudspeakers, did not violate *Peerless Plywood*); *compare US Ecology, Inc. v. NLRB*, 772 F.2d 1478, 1480-82 (9th Cir. 1985) (finding election-eve union dinner not objectionable because not mandatory and not on company time or premises), *with NLRB v. Belcor, Inc.*, 652 F.2d 856, 861 (9th Cir. 1981) (remanding for hearing given evidence that union meeting 24 hours before election was referred to as "mandatory"). Finally, minor conversations between employees and either a union agent or a supervisor, even when conducted within 24 hours of the election, are permissible. *See Comcast Cablevision of New*

Haven, Inc., 325 NLRB 833, 833 n.2, 838 (1998) (finding that *Peerless Plywood* did not apply to "brief urging of voters to vote for the [u]nion as they entered and left the facility").

Given the *Peerless Plywood* rule's limited scope, the Board acted well within its broad discretion in finding (CER 33) that the Union's alleged "home visits, telephone calls, campaigning and handbilling [in the] 24-hour period immediately preceding the election did not run afoul of Board policy" because the "employees were neither on the clock nor compelled to attend any [union] meeting en masse." Indeed, "solicitation while entering and leaving the premises, at their homes, and at union meetings [] are time-honored and traditional means by which unions have conducted their organizational campaigns." *Livingston Shirt Corp.*, 107 NLRB 400, 406 (1953). The Union's alleged use of those "time-honored" means here does not come close to the captive audience speeches that *Peerless Plywood* aims to restrict. *See id.* at 408 (stating that within 24 hours of election, employers and unions "may issue statements, talk to individual employees, write letters to them, or even invite them to listen to a speech on or off the employer's premises, so long as the occasion is on the employees' own time and their attendance is voluntary"). For example, in accordance with well-settled precedent, the Board reasonably found the Union's home visits unobjectionable in the absence of "evidence of any accompanying threatening or other coercive conduct."

(CER 33.) *See, e.g., Canton, Carp's, Inc.*, 127 NLRB 513, 513 n.3 (1960) (union's home visits for the purpose of campaigning were not coercive or a basis for setting aside election because they were unaccompanied by threats or coercive conduct). And the Union's circulation of campaign literature on the morning of the election is unobjectionable because the Board specifically exempted distribution of campaign literature from its 24-hour proscription. (CER 33 & n.3.) *Peerless Plywood*, 107 NLRB at 430.

Moreover, as the Board reasonably found (CER 33), Capay makes no claim (CER 12-13, Br. 16-17) that the home visits, telephone calls, or conversations with employees outside the facility were "mandatory" or on working time.[5] *See Peerless Plywood*, 107 NLRB at 429 (limiting holding to mandatory speeches "on company time to massed assemblies of employees"). And Capay proffered no evidence that the employees could not simply ignore the Union by hanging up the telephone, closing the door to their homes, or walking away if they were not interested in hearing the Union's message. *See Virginia Concrete*, 338 NLRB at 1187 (finding that employer's electronic message to employees' trucks did not

[5] Capay's claims and evidence (Br. 17, CER 53-55 ¶¶ 4, 6, 8, 9) that certain employees felt harassed, threatened, or coerced by the Union's campaigning and solicitations for support are immaterial because the standard for objectionable conduct is objective (CER 33). "It is well established that 'the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct.'" *Corner Furniture Disc. Ctr., Inc.*, 339 NLRB 1122, 1123 (2003) (citing cases).

violate *Peerless Plywood* because "drivers could delete or scroll past it if they chose").

Nor does Capay make any convincing claim that the Union gathered employees "en masse" (CER 33) to deliver its message. *See Peerless Plywood*, 107 NLRB at 429; *White Motor Sales v. NLRB*, 486 F. App'x 130, 131 (D.C. Cir. 2012) (finding that Board did not abuse its discretion in declining to hold hearing on alleged *Peerless Plywood* violation because union organizer "did not summon employees to assemble" and "his spontaneous remarks . . . were not 'election speech' for purposes of the [] rule"). Capay's suggestion that the Union may have concertedly telephoned all voting-eligible employees separately to ask them to vote "yes" (CER 69-87, Br. 16) is certainly not akin to delivering a speech to a "massed assembl[y] of employees on company time." *See Virginia Concrete*, 338 NLRB at 1187 (electronic message sent to employees' trucks was not delivered to "massed assemblies of employees," or even to employees "working with or near each other"); *Associated Milk Producers*, 237 NLRB 879, 879-80 (1978) (statements were not "elevated to the status of a speech to a massed employee assembly merely because they were repeated by [employer] to every employee one after another at each one's workplace"). And, even if the Union spoke to groups of employees as they entered the facility on election day, as Capay alleges (Br. 8, 16, *see* CER 54), brief conversations, even with small groups of employees, are "not the kind of

election speech to a captive massed audience envisioned by the Board" as objectionable. *See Bus. Aviation, Inc.*, 202 NLRB 1025, 1025, 1027 (1973) (brief conversation on day before election, during which union agent solicited authorization cards and discussed benefits of unionization, not objectionable); *Associated Milk Producers*, 237 NLRB at 880 (manager's urging voting-eligible employees, individually and in groups, to vote "no" on morning of election not objectionable).

Finally, *Bro-Tech Corporation v. NLRB*, 105 F.3d 890 (3d Cir. 1997), cited by Capay (Br. 16), is distinguishable. There, the court found that the Board deviated, without explanation, from its *Peerless Plywood* jurisprudence in finding that a union's use of a sound truck to broadcast taped music with pro-union lyrics for nine and a half hours on the day of the election was unobjectionable because it was not campaign speech. *Id.* at 892, 897. Not only is that case factually distinguishable (the court found there that the broadcasts "were audible within the plant throughout the day" and "appeal[ed] to the most visceral emotions of the workers," *id.* at 896), but here, the Board's decision applied well-established *Peerless Plywood* precedent to find that the Union's conduct did not violate those principles. Accordingly, the Board acted well within its broad discretion in finding (CER 34) that Capay's evidence in support of Objections 2, 3, and 4 "does not raise substantial and material issues of fact that would warrant a hearing."

3. The Court lacks jurisdiction to hear Capay's allegations of improper electioneering and surveillance because they were not timely raised before the Board

Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). Moreover, it is well-settled that "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *NLRB. v. SE Ass'n for Retarded Citizens, Inc.*, 666 F.2d 428, 432 (9th Cir. 1982) (quoting *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)); *accord Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB*, 921 F.2d 1275, 1284 (D.C. Cir. 1990). To comply with Section 10(e) and to "preserve objections for appeal[,] a party must raise them in the time and manner that the Board's regulations require." *Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011).

Under the Board's rules, a request for review "may not raise any issue or allege any facts not timely presented to the regional director." 29 C.F.R. § 102.67(e). The Board will not consider issues or facts raised for the first time in a request for review. *Pulau Corp.*, 363 NLRB No. 8, 2015 WL 5451457, at *1 n.1 (Sept. 16, 2015) (citing cases); *cf.* 29 C.F.R. § 102.69(a) (stating that parties must

file objections "[w]ithin 7 days after the tally of ballots has been prepared" and that objections "must be timely").

Here, as the Board reasonably found (CER 89 n.1), Capay's Request for Review raised issues not first presented to the Regional Director in contravention of the Board's rule. In Objections 2-4, Capay claimed that the Union's purported conduct violated "the captive audience rule," citing no Board precedent and making no broader allegations about unlawful electioneering or surveillance. (CER 12-13.) Given Capay's reference to the captive audience rule, and to the "24-hour period immediately preceding the election" (CER 12-13), the Regional Director reasonably confined his analysis to whether the alleged conduct, assumed to be true, violated the Board's *Peerless Plywood* rule (CER 32-34). *See Ceva Logistics U.S., Inc.*, 357 NLRB 628, 628 n.3 (2011) (stating, in dicta, that "[a]bsent any specific argument by the [union], the Regional Director reasonably treated the 24 hours reference as alleging a *Peerless Plywood* 'captive audience' type meeting"). Capay's Request for Review (CER 48-49), however, claimed not only that the Union's pre-election conduct violated *Peerless Plywood*, but that the Union's mere presence outside Capay's facility on the morning of the election

constituted "election interference," citing electioneering and surveillance cases outside the narrow *Peerless Plywood* context (*see also* Br. 17-18).[6]

Thus, the Board properly refused (CER 89 n.1) to consider those electioneering and surveillance issues, as they were not raised "in the time and manner" required under the Board's practice. *Spectrum Health-Kent Cmty. Campus*, 647 F.3d at 348; *L.D. McFarland Co.*, 572 F.2d at 260 (where employer failed to establish "special circumstances" justifying untimely filing of election objection, "[t]he Board did not abuse its discretion in refusing to consider the objection, either in the representation proceeding, or in the unfair labor practice action"). And under Section 10(e) of the Act, the Court lacks jurisdiction to consider the substance of those arguments for the first time on review. *See Vari-Tronics*, 589 F.2d at 993 (refusing to consider argument raised "after the [time] period allowing for filing objections").

[6] To the extent that Capay claims (Br. 13) it is "uncertain" about which issues were untimely, it never filed a motion for reconsideration with the Board to argue that a failure to "provide any analysis regarding the underlying evidence" was error. As such, its suggestion of error is not properly before the Court. *See* 29 C.F.R. § 102.65(e)(1)-(2) (providing for motion for reconsideration); *Huntington Ingalls, Inc.*, 361 NLRB No. 64, 2014 WL 4966737, at *3 (2014) (rejecting argument that could have been raised on motion for reconsideration of Board's representation-case decision), *enforced*, 631 F. App'x 127 (4th Cir. 2015); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (finding claim was jurisdictionally barred because employer failed to file motion for reconsideration or rehearing before Board). Moreover, as described below (pp. 30-33), the Board's cited cases make clear which issues were deemed untimely.

4. The Union did not engage in improper electioneering or surveillance

In any event, even if the Court were to consider Capay's additional electioneering and surveillance allegations, the Board reasonably found (CER 89 n.1) that, aside from being untimely, those allegations were "without merit." Because "it is unrealistic to expect parties or employees to refrain totally from any and all types of electioneering in the vicinity of the polls," *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118 (1982), *enforced*, 703 F.2d 876 (5th Cir. 1983), "[t]he Board has repeatedly declined to impose a zero-tolerance rule on voting day electioneering," *Family Serv. Agency San Francisco v. NLRB*, 163 F.3d 1369, 1381 (D.C. Cir. 1999) (citing cases); *accord Hudson Oxygen*, 764 F.2d at 732. Rather, the Board "makes a judgment, based on all the facts and circumstances, whether the electioneering substantially impaired the exercise of a free choice so as to require the holding of a new election." *Boston Insulated Wire & Cable Sys. v. NLRB*, 703 F.2d 876, 881 (5th Cir. 1983) (quoting *Glacier Packing Co.*, 210 NLRB 571, 573 n.5 (1974)). The Board's "general rule against electioneering at the polling place is limited to electioneering that occurs while the polls are open." *Hudson Oxygen*, 764 F.2d at 732; *accord Golden Age Beverage Co.*, 415 F.2d at 30-31.

Assuming the proffered evidence to be true, the Board reasonably found Capay's additional electioneering and surveillance allegations meritless because

the Union's "alleged misconduct did not involve prolonged conversations with voters, and it occurred several hours before the polling period and far from the designated polling area." (CER 89 n.1.) Indeed, despite now claiming that the conversations were "prolonged," (Br. 18) neither Capay's objections nor its offer of proof contain any such assertion (*see* CER 12-13, 53-55, 69-87). In addition, Capay concedes (Br. 16, 18) that the Union's purported electioneering took place in the morning, long before the afternoon polling periods (2:30 p.m. to 3:15 p.m. and 5:00 p.m. to 5:45 p.m.). (CER 24, *see* CER 54 ¶ 8 (alleging that Union stopped Contreras and other employees at 5:20 a.m.). And, according to Capay, the Union spoke to employees outside the facility (CER 53-55, 75, *see* Br. 15-18), but the election took place inside, in the employee break room (CER 24).

Nevertheless, Capay argues (Br. 18) that a party's continual presence in a place where employees have to pass to vote, constitutes objectionable conduct sufficient to set aside the election. But Capay's cited cases establish no such bright-line rule, and the conduct in those cases – electioneering during the polling period, in violation of a no-electioneering zone or in proximity to the polling place, and garnering admonitions from a Board agent – is distinguishable from that alleged here. *See Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 991-93 (D.C. Cir. 2001) (objectionable electioneering in no-electioneering zone, while polls were open, in contravention of instructions of Board agent, and despite complaints

from employer); *Claussen Baking Co.*, 134 NLRB 111, 112 (1961) (objectionable electioneering within approximately 15 feet of polls, during polling period, and Board agent requested its discontinuance). Here, the Union's alleged electioneering involved no similar factors and was well within permissible limits. *See, e.g.*, *J.P. Mascaro & Sons*, 345 NLRB 637, 639 (2005) (employer's electioneering permissible because well outside front entrance, separated from polling place, not in designated no-electioneering zone, and not in contravention of instructions from Board agent or complaints from union); *Boston Insulated Wire*, 259 NLRB at 1119 (union's electioneering permissible because separated from line of voters by glass door, not in designated "no-electioneering" zone, and not in violation of instructions of Board agent).

Neither *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982), nor *Performance Measurements Co.*, 148 NLRB 1657 (1964), cited by Capay (Br. 18), require a different result. Although they stated generally that a party's presence at a place where employees must pass in order to vote is coercive, those cases involved continued supervisory surveillance near the polling area while the voting was in progress.[7] *See Elec. Hose*, 262 NLRB at 216 (supervisor continually present, without explanation, 10-15 feet from entrance to voting area);

[7] The Board has referred to those cases as involving objectionable surveillance, rather than electioneering. *See J.P. Mascaro & Sons*, 345 NLRB 637, 639 (2005) (distinguishing electioneering from surveillance).

Performance Measurements, 148 NLRB at 1659 ("Employer's president stood by the door to the election area so that it was necessary for each employee who voted to pass within 2 feet of him to gain access to the polls."). In contrast to those cases, Capay presented no evidence that the Union was present while voting was in progress or that it was able to see employees entering the polling area. *See J.P. Mascaro & Sons*, 345 NLRB at 639 (finding no objectionable conduct where employer stood outside entrance to facility during election because he "had no way of knowing who was entering to vote and who was entering to perform job-related duties or to eat and drink in the vending/snack room"); *Blazes Broiler*, 274 NLRB 1031, 1032 (1985) (finding no objectionable conduct where union agent sitting near entrance to voting area "had no way of knowing who was entering the hallway to vote and who was entering to perform job related duties, or heading to the time clock").

Accordingly, even if Capay's additional electioneering and surveillance allegations were properly raised, the Board acted well within its broad discretion in dismissing those arguments as meritless. (CER 89 n.1.) *See New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1077 (D.C. Cir. 2007) (finding that employer's "paltry evidentiary offering" alleging improper electioneering "outside the polling area or any no-electioneering zone" was insufficient to warrant an evidentiary hearing).

D. The Board Did Not Abuse Its Discretion in Overruling Objection 5 Without a Hearing

The Board, assuming Capay's proffered evidence to be true, also acted well within its broad discretion in finding that the conduct alleged in Objection 5 is unobjectionable as a matter of law. (CER 34-35.) Because Capay failed to establish a prima facie case of objectionable conduct, the Board did not err in overruling Objection 5 without a hearing.

1. Capay's evidence in support of Objection 5

In Objection 5, Capay claimed that union representatives told employees that Capay would check their immigration status and terminate them if they voted against the Union and that the Union would protect them if they voted for the Union. (CER 31, 34; CER 13.) In support of its Objection, Capay submitted an offer of proof and affidavits from two employees. (CER 53-54, 71, 75-76.) The Board found that Capay's evidence showed that during a union meeting "and in response to an employee's inquiry, a [union] agent informed employees that the [Union] did not check papers. The agent said that the [Union] would protect employees, but if employees voted no, there would be no protection and [Capay] could retaliate against employees by checking papers and even terminating them." (CER 34; *see* CER 53-54, 75-76.) Also, one employee stated that a union agent "promised him that it could secure him a pay increase to $30/hour given his position and title in the maintenance department, and that, if [Capay] didn't like it,

[the Union] would get the employee a job at another warehouse where he could earn $30/hour." (CER 34-35; *see* CER 53, 69.)

2. Capay's proffered evidence of the Union's alleged "threats" is insufficient to set aside the election

Assuming Capay's factual assertions to be true, the Board reasonably found that the Union's alleged "prediction of what might happen" (CER 33) if the Union lost the election (*i.e.*, Capay's terminating employees and/or checking their immigration status) was campaign propaganda permissible under the Board's decision in *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 133 (1982). *Midland* and its progeny are the Board's "longstanding and controlling precedent" in cases where a party seeks to overturn an election based on another party's campaign misrepresentations. *See Majestic Star Casino, LLC v. NLRB*, 373 F.3d 1345, 1348 (D.C. Cir. 2004); *accord NLRB v. Best Prods. Co.*, 765 F.2d 903, 911 (9th Cir. 1985) (noting Ninth Circuit's approval of *Midland*).[8] Under *Midland*, the Board will not "probe into the truth or falsity of the parties' campaign statements, and . . .

[8] Capay notes (Br. 21 n.2) that some courts employ a broader standard, asking whether misrepresentations are "so pervasive and the deception so artful that employees will be unable to separate truth from untruth." *See, e.g., Van Dorn Plastic Mach. Co. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984). The Board has not adopted this standard, nor has the Court. *See, e.g., NLRB v. Best Prods. Co.*, 765 F.2d 903, 911 & n.9 (9th Cir. 1985) (noting, without adopting, broader standard). Nevertheless, Capay has not presented evidence that the Union's alleged statements were so pervasive and deceptive as to meet this test. Despite Capay's contention (Br. 21 n.2), it is not entitled to a "fishing expedition" to determine whether the alleged misrepresentations were pervasive. *See Natter Mfg. Corp. v. NLRB*, 580 F.2d 948, 952 n.4 (9th Cir. 1978).

will not set elections aside on the bases of misleading campaign statements." *NLRB v. Cal-W. Transp.*, 870 F.2d 1481, 1489 (9th Cir. 1989) (quoting *Midland*, 263 NLRB at 133). The Board's *Midland* rule is premised on "a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." 263 NLRB at 132. Thus, as this Court recognized, the Board will intervene only in "cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Best Prods. Co.*, 765 F.2d at 911 (quoting *Midland*, 263 NLRB at 133); *see also US Ecology, Inc.*, 772 F.2d at 1482.

The Board reasonably found that, measured against *Midland*'s clear standard for upsetting election results based on campaign misrepresentations, Capay's evidence failed to establish any objectionable conduct. (CER 33-35.) Although *Midland* does not immunize coercive threats (see 263 NLRB at 133 and below pp. 37-40), here, a reasonable employee would recognize the Union's alleged statements, not as threats, but as campaign propaganda extolling the benefits of the Union and "predict[ing] what might happen" (CER 33) to employees without the Union's protection. *See Cal-W. Transp.*, 870 F.2d at 1488-89 (holding that union business agent's statement that "that if [employees] didn't vote for the [u]nion, they would be fired," and that "once the [u]nion was in, the [e]mployer would have

to have a good reason to fire us" was permissible campaign propaganda under *Midland*).

Alternatively, the Board reasonably found that even if the Union's purported statements about job loss and immigration checks were analyzed as potential "threats," rather than as campaign propaganda, Capay failed to make a prima facie showing that those "threats" warrant setting aside the election because the Union "plainly lacked the capability to carry out any of the asserted 'threats.'"[9] (CER 34, *see* CER 35.) The Board, with court approval, has long held that "the coercive aspect of an unlawful threat derives from the ability of the speaker or party to carry out the threat" and that threats which the party could not carry out are not objectionable. *Smithfield Packing Co.*, 344 NLRB 1, 11 (2004), *enforced sub nom. United Food & Commercial Workers Union Local 204 v. NLRB*, 447 F.3d 821 (D.C. Cir. 2006); *see, e.g.*, *NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 116 (D.C. Cir. 2012) (noting Board precedent finding that job-loss threats from union representatives do not necessarily void an election because such threats are "illogical" and citing cases); *Pacific Grain Prods.*, 309 NLRB 690, 691 (1992) (finding that employee could not reasonably believe that union had the ability to

[9] *Westwood Horizons Hotel*, 270 NLRB 802 (1984), cited by Capay (Br. 19) is inapplicable here. That case sets forth the standard for evaluating threats by individuals who are not parties to the election (third-party threats), which are not alleged here. *Id.* at 803.

carry out threat of job loss because employer submitted no evidence that union had any control over employees' job security).

Capay does not allege that the Union told employees that it would cause Capay to terminate employees or check their papers or that the Union itself would "initiate an immigration or work-authorization audit." (CER 34 n.5.) To the contrary, Capay concedes (Br. 20) that the Union has no power to persuade Capay to carry out the Union's so-called threats and that such threats would indeed "be illogical." By its own admission then, Capay fails to make a prima facie showing of objectionable conduct under the Board's long-established precedent discussed above.

In light of that admission, Capay's cited cases (Br. 19-20) are distinguishable. *Viracon, Inc.*, 256 NLRB 245 (1981), and *Vickers, Inc.*, 152 NLRB 793 (1965), both involved threats by a party to the election under circumstances where employees could reasonably believe that the party had the capability of carrying out the threats. *See Viracon*, 256 NLRB at 247, 252-53 (employer threatened to call immigration officials if employees voted for union); *Vickers, Inc.*, 152 NLRB at 795 (longstanding union, in which membership was a

condition of employment, threatened that union expulsion of employees supporting rival union "would probably affect their job rights").[10]

Capay's reliance (Br. 19-20) on *NLRB v. Valley Bakery, Inc.*, 1 F.3d 769 (9th Cir. 1993), to argue that a hearing was required to evaluate the Union's alleged threats that Capay would retaliate against employees because of their involvement in the union effort is unavailing. First, Capay ignores that in *Valley Bakery*, the employer was unable to obtain employee testimony absent subpoenas, and the vote was very close. *Id.* at 771-73. There is no similar concern here; Capay submitted statements from multiple employees. (CER 69-87.) Instead, the Board here, after examining that evidence, found that the alleged union conduct, taken as true, was not objectionable as a matter of law. (CER 34-35.) Second, the threats alleged in *Valley Bakery* and this case are materially different. There, the union allegedly threatened that if the union lost the election, the employer would retaliate against employees who supported the union by signing authorization cards. *Id.* at 773. The Court specifically distinguished those threats – threats targeted at union supporters – from the type of union threats alleged in this case – threats that employees would be discharged if they did *not* vote for the union. *Id.*

[10] Nor does *Mountaineer Bolt*, 300 NLRB 667 (1990), help Capay. There, the Board, in dicta, simply noted without elaboration that the regional director in that case had ordered a hearing "on the issue of whether new employees had been threatened by the [u]nion with loss of their jobs if the [u]nion did not win the election." *Id.* at 667.

In doing so, the Court noted that threats similar to those alleged here "might indeed be labeled illogical" because employees could be expected to conclude that their employer would not retaliate against employees who aided its cause by voting *against* the union. *Id.*

Having failed to present a prima facie claim of union misconduct, Capay is not entitled to an evidentiary hearing simply to "inquire further" into what was said and how it may have affected the election, as it asserts (*see* Br. 20-21). *Vari-Tronics*, 589 F.2d at 993. The Board acted well within its broad discretion in overruling Objection 5. (CER 35.)

3. Capay's proffered evidence of the Union's alleged promises to a non-voting-eligible employee is insufficient to set aside the election

For similar reasons, the Board acted within its discretion in finding (CER 35) that, even assuming they related to Objection 5, the Union's alleged promises to a non-voting-eligible employee did not warrant an evidentiary hearing. Although an *employer*'s promise or grant of benefits to employees is unlawful and constitutes election interference if made for the purpose of inducing employees to vote against the union, *NLRB v. Exch. Parts Co.*, 375 U.S. 405, 409 (1964), *union* promises have customarily been considered lawful campaign propaganda because "[e]mployees are generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieve them through

collective bargaining," *DLC Corp.*, 333 NLRB 655, 655 (2001) (quoting *Smith Co.*, 192 NLRB 1098, 1101 (1971)); *NLRB v. Spring Rd. Corp.*, 577 F.2d 586, 588-89 & n.2 (9th Cir. 1978) (holding that Board did not abuse its discretion in finding that union's purported promises of better wages, benefits, and job security "were mere 'puffing,' dependent upon 'contingencies beyond a union's control'").

Capay's objections and offer of proof contain no evidence that the Union had the power to secure the employee a $30/hour position at Capay or a higher-paying position elsewhere. (CER 35.) *Alyeska Pipeline Serv. Co.*, 261 NLRB 125 (1982), cited by Capay (Br. 21), is distinguishable on that basis because there, the union had the power to implement its promises. *See id.* at 127 (finding union's promise that members would have an advantage over non-union members in securing high-paying construction jobs was coercive because union "controls all access to construction jobs . . . for these employees and thus possesses a power comparable to an [e]mployer's power to close a plant"). Here, a reasonable employee, hearing the Union's alleged "promises," could "recognize propaganda for what it is." *Midland*, 263 NLRB at 133. And the Board acted well within its broad discretion in finding (CER 35) that the Union's alleged promises were permissible campaign propaganda under *Midland*. *See* pp. 35-37.

Moreover, even if the alleged statements were not considered campaign propaganda, the likelihood of coercion is attenuated here because the recipient of

the alleged promises was not an eligible voter. (CER 35 n.6.) Thus, the promises could have affected voting only if eligible employees were both aware of the promises and could reasonably assume that similar benefits would flow to them. *See Micronesian Telecommunications Corp. v. NLRB*, 820 F.2d 1097, 1103 (9th Cir. 1987), *amended*, (9th Cir. Sept. 2, 1987) (finding union representative's buying employee beer not objectionable because employee was supervisor and not eligible to vote); *Melrose-Wakefield Hosp. Ass'n, Inc. v. NLRB*, 615 F.2d 563, 570 (1st Cir. 1980) (evidence of alleged vandalism of non-voting-eligible employees' vehicles and coercive remarks to non-voting-eligible employee not sufficient to warrant a hearing). Having presented no evidence that voting-eligible employees were aware of the statements (aside from alleging that the Union made the statements to the employee at a "union function" (Br. 22)), Capay is not entitled to a hearing to "develop" their testimony, as it asserts (Br. 22). *See L.D. McFarland Co.*, 572 F.2d at 261 (stating that objecting party's disagreement with Regional Director's inferences and conclusions, without more, is insufficient to warrant a hearing (citation omitted)).

E. The Cumulative Impact of Insubstantial Objections Does Not Warrant Reversal

As shown, all of Capay's election objections were reasonably rejected by the Board. Contrary to Capay's contention (Br. 9, 15, 22), the cumulative impact of its allegations of misconduct does not strengthen its position. As the Court found in

Spring City Knitting, 647 F.2d at 1020, cumulative impact arguments "should be approached cautiously." "[F]or the Board to abuse its discretion by not finding that the totality of a party's conduct, no single component of which is legally objectionable, requires a new election, the complainant must, at a minimum, offer the Board detailed evidence of the pattern the activity formed and its influence on the election." *Melrose-Wakefield Hosp.*, 615 F.2d at 570 (followed by *Spring City Knitting Co.*, 647 F.2d at 1020); *accord NLRB v. Browning-Ferris Indus.*, 803 F.2d 345, 349-50 (7th Cir. 1986); *cf. NLRB v. Decoto Aircraft, Inc.*, 512 F.2d 758, 761 (9th Cir. 1975) (stating that Board "was free to conclude that [employer's] conduct represents a systematic pattern of activity tending to upset the laboratory conditions requisite to a valid election").

A "cumulative impact argument 'may not be used to turn a number of insubstantial objections to an election into a serious challenge,'" as Capay has attempted to do here. *Browning-Ferris Indus.*, 803 F.2d at 349 (quoting *Amalgamated Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1569 (D.C. Cir. 1984)). Capay has neither "demonstrate[ed] conduct that is legally actionable in its component parts," nor "offer[ed] the Board detailed evidence of the pattern the activity formed and its influence on the election." *Browning-Ferris Indus.*, 803 F.2d at 349-50; *accord Spring City Knitting Co.*, 647 F.2d at 1020. Accordingly,

Capay has failed to meet its heavy burden of proving that the Board abused its discretion in declining to hold a hearing on its election objections.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying Capay's petition for review and enforcing the Board's Order in full.

STATEMENT OF RELATED CASES

Board counsel is unaware of any related cases pending in the Ninth Circuit.

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STATUTORY AND REGULATORY ADDENDUM

Except for the following, all applicable statutes, rules, and regulations are contained in the brief or addendum of Capay. *See* FRAP 28(f) and Circuit Rule 28-2.7.

NATIONAL LABOR RELATIONS ACT

Sec. 7. [§157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Sec. 8 [§158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> ***

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

THE BOARD'S RULES AND REGULATIONS

Section 102.65 [29 C.F.R. § 102.65] *Motions; intervention; appeals of hearing officer's rulings*

***

(e)(1) A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision or report for reconsideration, for rehearing, or to reopen the record, but no such motion shall stay the time for filing a request for review of a decision or exceptions to a report. No motion for reconsideration, for rehearing, or to reopen the record will be entertained by the Board or by any regional director or hearing officer with respect to any matter which could have been but was not raised pursuant to any other section of these rules, except that the regional director may treat a request for review of a decision or exceptions to a report as a motion for reconsideration. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on for the motion. A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing de novo, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the regional director or the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion for reconsideration or for rehearing pursuant to paragraph (e)(1) of this section shall be filed within 14 days, or such further period as may be allowed, after the service of the decision or report. Any request for an extension of time to file such a motion shall be served promptly on the other parties. A motion to reopen the record shall be filed promptly on discovery of the evidence sought to be adduced.

Section 102.67 [29 C.F.R. § 102.67] *Proceedings before the regional director; further hearing; action by the regional director; appeals from actions of the regional director; statement in opposition; requests for extraordinary relief; Notice of Election; voter list*

***

> (e) Contents of request. A request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to the ground listed in paragraph (d)(2) of this section, and other grounds where appropriate, the request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. Such request may not raise any issue or allege any facts not timely presented to the regional director.

THE BOARD'S CASEHANDLING MANUAL, PART TWO, REPRESENTATION PROCEEDINGS

Sec. 11474 Form

The form of a certification will vary with the circumstances. A certification may be a separate document or may appear at the end of a report or supplemental decision on challenges and/or objections.

When the Board or a Regional Director does not rule on eligibility or unit placement prior to an election, and directs that the disputed classification be permitted to vote subject to challenge and those challenges are not determinative of the results, appropriate language should be used to indicate that the challenged classifications are neither included in nor excluded from the bargaining unit, inasmuch as no determination has been made regarding the disputed placements. Such information should be conveyed in a footnote in a certification, such as:

> Note, however, that (*unit category*) are neither included in nor excluded from the bargaining unit covered by this certification, inasmuch as the Board, in denying the (employer/union)'s request for review of the Regional

> Director's decision in this matter, excepted the unit placement of (*unit category*) and ordered them voted subject to challenge.

In a self-determination election held among professional employees (Sec. 11091.1), appropriate language should be used. For example, whatever the majority answer may be to the first question ("Do you wish to be included with nonprofessional employees in a unit for the purposes of collective bargaining?"), a footnote on the certification of representative or certification of results (whichever applies) should convey this information.

Sec. 11490.1 UC (Unit Clarification) Petition

A UC petition is usually filed by an employer or a labor organization to clarify whether particular employees should be included in or excluded from an existing unit. The collective-bargaining representative named therein need not have been certified.

UC petitions are sometimes filed when there have been changes in the employer's operations or among the employer's employees and the parties are unable to agree whether or not the affected employees should be included in or excluded from the recognized unit. A UC petition may also be used to decide the status of individuals whose status was not determined by the Regional Director or the Board (Sec. 11474) or who voted subject to challenge in an election but whose ballots were not determinative.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAPAY, INC. d/b/a FARM FRESH TO YOU	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-70699 and 16-71001
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	20-CA-166233
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
BAKERY, CONFECTIONERY, TOBACCO WORKERS & GRAIN MILLERS UNION LOCAL 85	)	
	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 10,190 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 13th day of September, 2016

UNITED STATES COURT OF APPEALS
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	)	
BAKERY, CONFECTIONERY, TOBACCO WORKERS & GRAIN MILLERS UNION LOCAL 85	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 13th day of September, 2016